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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

RECORDING INDUSTRY ASSOCIATION
OF AMERICA, INC., ET AL.,

Plaintiffs,

v.

DIAMOND MULTIMEDIA SYSTEMS, INC.,

Defendant.

) CASE NO.: 98-8247 ABC (RZx)

) DIAMOND MULTIMEDIA
SYSTEMS' POINTS AND

) AUTHORITIES IN OPPOSITION
TO TEMPORARY

) RESTRAINING ORDER

) DATE: October 16, 1998

) TIME: 9:30 a.m.

COURT: Hon. Audrey Collins

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INTRODUCTION

Diamond Multimedia Systems ("Diamond Multimedia") files this memorandum of points and authorities in opposition to Plaintiffs' application for a temporary restraining order and order to show cause why a preliminary injunction should not issue.

Diamond Multimedia urges this court to deny Plaintiffs' request on the ground that both the plain language of the Audio Home Recording Act of 1992, and its purposes, do not apply to the Rio Player computer product that Diamond Multimedia is bringing to the market. Plaintiffs are free to take their concerns to Congress, as they have before, but they cannot stretch the Act to fit their purpose in this case. Plaintiffs' smears about "piracy" have no place in relation to Diamond Multimedia, a major and well-respected manufacturer and distributor of computer products that are used by millions of consumers, and integrated into computer systems by major American computer manufacturers.

FACTUAL BACKGROUND

Diamond Multimedia Systems, Inc. In The Multimedia Marketplace

Diamond Multimedia Systems, Inc., is one of the world's leading manufacturers of computer products, specializing in products to improve multimedia, audio, graphics, video, and communications uses of personal computers. According to International Data Corporation, a leading analyst of the computer industry, in October 1997 Diamond Multimedia had the largest worldwide share of the branded graphics board market. Over the past seven years, Diamond Multimedia's strength in creating a broad line of state-of-the-art interactive multimedia and connectivity solutions for the personal computer market has been recognized through hundreds of industry awards from leading national and international computer magazines. Declaration of Kenneth Wirt ("Wirt Decl.") at ¶ 2.

A publicly traded company, with over 800 employees and sales of over \$470 million in the first nine months of this fiscal year, much of Diamond Multimedia's progress can be attributed to the quick identification of evolving customer needs, coupled with the company's ability to quickly bring affordable, high quality, high technology products to market ahead of competitors. Wirt Decl. at ¶ 3. The company is "silicon agile," sourcing chips from a variety of semiconductor developers, which allows Diamond to keep pace with the rapid advances in PC multimedia and connectivity technology. Id.

The company is recognized for its superior engineering. Diamond's products maintain high

brand-awareness and loyalty among both consumer and professional multimedia computer users and dealers. Diamond's products are popular not only at retail but also among manufacturers of computer systems who choose to build their systems with Diamond's multimedia products. Wirt Decl. at ¶ 4.

Diamond's New Rio Player

Diamond Multimedia's new Rio Player is a computer peripheral device designed to store and play back audio files transferred from the computer's hard drive. Declaration of Don Spencer at ¶ 2 ("Spencer Decl.").

What is new about this type of computer peripheral is that one can detach the Player from the computer and play back the audio files separately through headphones while away from the computer. Wirt Decl. at ¶ 5.

A reason for the product's anticipated success is that it is very small, is lightweight, and has no moving parts, which makes it especially well suited to use during vigorous activity. If a user jogs while carrying a CD player, for example, the CD will often skip because the jarring of the jogging will disturb the CD player's mechanisms. Here the audio files are stored by a user's PC on chips embedded in the product, and shaking will not cause the playback to suffer. Id.

The Rio relies upon a new technology that has recently made storage and Internet distribution of audio content more efficient. "MPEG 1 Layer 3" -- called "MP3" for short -- is an improved technology for compressing sound files for speedier transfer, and for more efficient storage. MP3 allows compression by a 10:1 ratio. It allows approximately 60 minutes of music, or over 8 hours of speech, to be compressed to 32 megabytes of storage space (or memory). The Rio contains 32 megabytes of memory on board in its "flash" memory design. Spencer Decl. at ¶ 2; Bridges Decl. at ¶ 2 and Exh. A.

The Rio is not a duplicating device. It is not capable of facilitating the serial copying of recordings. It is not capable of "uploading" files to a computer or the Internet. It is not an archiving device. Spencer Decl. at ¶ 3.

The Rio has no audio content output capability whatsoever, except for an analog signal sent by the Player to the headphones to generate the sound that the user hears. Id.

As shown more fully below, the Rio does none of the things that the plaintiffs claim to fear. It is incapable of causing the harms the plaintiffs allege.

Moreover, the Rio does not itself perform any recording function. The Rio Player contains the following components: (1) "flash" memory, (2) an MPEG decoder, (3) an output digital-to-analog converter, (4) a micro controller for the buttons that control the Rio Player's functions, (5) a socket for a miniature circuit board (called a "card") that extends the flash memory, (6) a power supply, (7) a jack for headphones, (8) the headphones themselves, (9) a parallel port and cable for connection to the personal computer, and (10) the FPGA - a dedicated controller which steers data to the Rio Memory. Spencer Decl. at ¶ 4.

The primary purpose of the Rio, as Diamond's advertisements make clear, is to allow consumers to store audio -- up to 60 minutes of music or over 8 hours of voice audio such as recorded books or news programs -- for personal use in a mobile setting. Wirt Decl. at ¶ 6.

The audio is embedded in the Rio solely by transfer from a personal computer. A user must transfer audio from another source, typically an audio CD or a file downloaded from the Internet, to a personal computer's hard drive. Software in that personal computer compresses and/or formats the audio files as needed for the Rio Player, and then the computer transfers the formatted files to the Rio by a cable. Spencer Decl. at ¶ 5.

The Rio is incapable of receiving audio files from a digital audio recording device or from a transmission. Moreover, the Rio does not perform the recording function; that is the function of the personal computer which writes the files to the Rio's memory. The Rio merely stores the files and plays them back. Spencer Decl. at ¶ 6.

Rio will sell for an estimated retail price of \$199.95. One can buy a memory upgrade card, which plugs into the Player to extend its storage capability. A memory upgrade sufficient for an additional 30 minutes of music or 4 hours of voice audio will cost \$49.95; a memory upgrade for 60 minutes of music or 8 hours of voice audio will cost \$99.95. Because of the high cost of the memory, there is no practical utility of the product, or its memory upgrade cards, for the archiving of music or voice audio. The added memory would cost approximately \$100 per hour of recorded music, whereas a typical CD contains about an hour of recorded music for around \$15. As a result, this device is useful only for the temporary storage of music for personal, portable use and not for long-term storage of a collection of music. Wirt Decl. at ¶ 7.

Diamond advertises the Rio for substantial lawful uses. Diamond's advertising specifically discusses personal home uses for mixing tracks off CDs, an activity expressly made lawful by the AHRA. Diamond also specifically advertises its relationships with legitimate Internet music distributors, such as MP3.com, GoodNoise, and MusicMatch. Wirt Decl. at ¶ 8 and Exh. A.

Diamond Multimedia has made a heavy investment in bringing the Rio to the market. To date, Diamond Multimedia has expended over \$3 million, and it must invest another \$3 to \$4 million in the next two weeks, regardless of the Court's decision on the present motion. Declaration of V. David Watkins ("Watkins Decl.") at ¶ 2.

Diamond Multimedia also has a lot riding on the launch of this product. Diamond has projected revenues for Rio products in the amount of \$10 million for the next three months alone, and over \$200 million over the next two years. *Id.* at ¶ 3. Delay in launching the product does not simply postpone revenue. It threatens the very product itself. *Id.* at ¶ 4.

The Plaintiffs And The Digital Recording Marketplace

The Recording Industry Association of America, Inc., ("RIAA") is a trade organization representing the commercial interests of record companies, principally the half-dozen companies that together control approximately ninety percent of the distribution of recorded music in the United States. Declaration of Robert Kohn ("Kohn Decl.") at ¶ 13.

It does not represent artists or composers. It does not stand for the creative aspects of the recording industry. It stands primarily for the large commercial interests. *Id.* at ¶ 14.

The advent of the Internet has threatened the RIAA for reasons it leaves unspoken. RIAA's members have a grip on the traditional methods of distribution of recorded music, principally record stores, with their music given prominence through air time on traditional radio stations. Artists with contracts with the big-six record companies prosper under this system, and the record companies are rewarded handsomely. Kohn Decl. at ¶ 15; Declaration of Dennis Mudd ("Mudd Decl.") at ¶ 13; Declaration of Paul Schatzkin ("Schatzkin Decl.") at ¶¶ 15, 17.

Other record companies struggle for shelf space in retail outlets, and for air time on major radio stations. Kohn Decl. at ¶ 16. Other artists struggle for attention, for an opportunity to be heard by the public. Declaration of Gian Caterine ("Caterine Decl.") at ¶ 3.

Just as the Internet has opened up new opportunities in many other fields, so it has in the recording industry. New, smaller record companies can distribute music cost effectively over the Internet, and new artists can find channels for their music to be heard and distributed. Mudd Decl. at ¶¶ 13-14; Schatzkin Decl. at ¶ 14. The investment required to compete with the big record companies is much smaller with Internet distribution than with traditional CD manufacture and distribution. Kohn Decl. at ¶ 17; Schatzkin Decl. at ¶ 11. The advent of MP3 technology, and the prospect of even more powerful technologies in the future, will make Internet distribution even more efficient in the near future. Kohn Decl. at ¶ 17; Schatzkin Decl. at ¶ 13.

It is the loosening of the grip by the RIAA on recorded music distribution that is its major fear. Music "piracy" -- the widespread distribution of illegal copies of recorded music -- has been a complaint of the RIAA and its members long before the Rio appeared. Kohn Decl. at ¶ 18; Declaration of Andrew P. Bridges ("Bridges Decl.") at ¶ 3 and Exh. B.

The Rio does not add to the threat of music "piracy." It makes no sense for a consumer to pay \$200 for the Rio Player to archive one hour of recorded music, or to pay \$100 for an upgrade to archive an additional hour of music, when a normal CD with approximately one hour of music costs approximately \$15 at retail. What the Rio does instead, is assist with the opening of a new channel of distribution for the newly emerging legitimate Internet music industry. It allows portable and convenient playback of music distributed through the Internet, as well as music selections from the user's CD collection. Wirt Decl. at ¶ 5; Kohn Decl. at ¶ 10.

The second plaintiff, Alliance of Artists and Recording Companies, is a vehicle for distributing royalties paid on products that fall under the Audio Home Recording Act of 1992. Based upon the Web page it presents at the RIAA Web site, it appears to be simply an accounting entity that shares an address with RIAA. See Bridges Declaration at ¶ 4 and Exh. C.

The History Of This Dispute

Diamond Multimedia had the first notice of a threat of this lawsuit on Wednesday, October 7, when it received a telephone call from representatives of the Recording Industry Association of America, Inc. They called to discuss a letter they had sent but Diamond had not yet received. Declaration of Rondal Moore ("Moore Decl.") at ¶ 2. The letter, faxed to Diamond after the call,

reads more like a press release than a serious warning or invitation to discuss real concerns. Moore Decl. at ¶ 3 and Exh. A.

During his initial telephone call with RIAA representatives, Diamond's general counsel, Ron Moore, discussed the RIAA's concerns about improper distribution of music over the Internet. Mr. Moore offered to work with RIAA to share information for the purpose of joining in the attack on illegal distribution of music, but RIAA officials deflected Diamond's offer by saying their efforts were confidential. Diamond then offered to execute a confidentiality agreement in which both Diamond and RIAA could share confidential information in order to explore avenues for cooperation. Moore Decl. at ¶ 4. RIAA's president agreed to furnish a confidentiality agreement but never did so.

After that telephone conversation, RIAA and the AARC filed suit without warning. (AARC had never communicated with Diamond.) On Thursday, October 8, at 5:00 p.m. Pacific Time, RIAA's director of litigation in Washington, DC, Steven Fabrizio, telephoned Diamond's general counsel to state that RIAA and Alliance of Artists and Recording Companies ("AARC") had sued Diamond in this proceeding and that RIAA would seek a temporary restraining order without specifying a timetable. RIAA did not furnish Diamond a courtesy copy of the complaint; nor did it furnish a case number or identify its counsel of record. Only after Diamond's counsel specifically requested a copy of the complaint and motion papers did RIAA furnish Diamond any of its litigation papers, on Friday October 9. Meanwhile, RIAA posted the complaint, its motion papers, and its self-serving demand letter on its web site. Plaintiffs' complaint and motion papers appear to have been posted to the world on the Internet before Diamond even received copies of them, and RIAA held a press conference at approximately the same time that Diamond first saw the complaint. Moore Decl. at ¶ 5.

LEGAL ARGUMENT

I. PLAINTIFFS ARE NOT ENTITLED TO A TEMPORARY RESTRAINING ORDER TO RESTRICT UNDER THE AUDIO HOME RECORDING ACT A PRODUCT THAT IS NOT GOVERNED BY THE ACT.

A. The Standard for a Temporary Restraining Order

A temporary restraining order is drastic relief, to be granted sparingly and with the utmost of caution.

"Public policy does not advocate the liberal issuance of preliminary injunctions in copyright infringement actions." Nintendo of America, Inc. v. Lewis Galoob Toys, 16 F.3d 1032, 1038 (9th Cir. 1994)(emphasis in original). As this Court has noted,

Traditionally, a court may issue a preliminary injunction if it determines: (1) the moving party will suffer irreparable injury if the relief is denied; (2) the moving party will probably prevail on the merits; (3) the balance of potential harm favors the moving party; and, depending on the nature of the case, (4) the public interest

favors granting relief." International Jensen v. Metrosound U.S.A., 4 F.3d 819, 822 (9th Cir. 1993).

Under the "alternative standard," a party may obtain a preliminary injunction, by demonstrating either: (1) a combination of probable success on the merits and the possibility of irreparable injury if relief is not granted; or (2) the existence of serious questions going to the merits and that the balance of hardships tips sharply in its favor. Id. "The alternative standards are not separate tests but the outer reaches of a single continuum." Id. (quotation omitted) Essentially, the trial court must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief. Schwarzer & Tashima, *Federal Civil Procedure Before Trial*, at 13:39.

Chase-Riboud v. Dreamworks, Inc., 987 F. Supp. 1222, 1224 (C.D. Cal. 1997).

B. Plaintiffs Cannot Show Any Likelihood of Success: The Audio Home Recording Act of 1992 Does Not Apply to the Rio Because it Is Not a "Digital Audio Recording Device" Within the Meaning of the Act.

Congress passed the Audio Home Recording Act of 1992 ("AHRA") to ensure the right of consumers to make analog or digital copies of sound recordings for personal use. See S. Rep. No. 102-294 at 86-7 (1992). The AHRA expressly immunizes that activity in 17 U.S.C. § 1008.

Congress also sought to combat a very specific problem implicated by the advent of digital technology: serial copying, or the ability to make unlimited perfect copies from a single copy of a digital musical recording. Congress chose to solve the problem of serial copying by designating a category of recording devices capable of serial recording and imposing upon the manufacture of those devices a requirement that they include a serial copy management system. S. Rep. No. 102-294 at 86-87 (1992). The Act was not intended to inhibit the listening of digital music, or even the making of several copies of a recording - only the unlimited serial copying of digital music, in other words making copies of copies.

The AHRA mandates that "[n]o person shall import, manufacture, or distribute any digital audio recording device" unless the device incorporates certain specified copying controls. 17 U.S.C. § 1002(a) (emphasis added). The RIAA bases its entire lawsuit on the proposition that the Rio Player is a "digital audio recording device" within the meaning of the AHRA and that the device violates § 1002(a) of the AHRA because it does not include the necessary serial copy management system. A thorough review of the plain language of the statute, however, reveals that the Rio Player is not the kind of device covered by the AHRA.

The reason is that Congress made a special exception to the Act for recordings that emanate from material objects on which computer programs are stored, such as a hard drive or a server. See 17 U.S.C. § 1001(5)(B)(ii). The computer exception to the AHRA kills the Plaintiff's case against Diamond's Rio computer peripheral product, which depends upon a personal computer for a recording function.

1. The Enactment of the AHRA: a Compromise Embodied in Definitions

The AHRA developed as a compromise among various competing interests regarding the copyright status of digital audio tape ("DAT"), which was developed in the late 1980s. S. Rep. No. 102-294, at 91 ("[I]n June 1991, a historic compromise was reached by all of the parties to the audio home taping dispute. . . . the Audio Home Recording Act . . . embodies the compromise reached between the [parties]"). The invention of DAT products, which are capable of making digital copies of digital recordings, upset the recording industry because the new technology allowed serial copying (i.e., the creation of identical copies of recorded music). The advent of digital recording devices such as digital audio tape (DAT) recorders raised the specter of unlimited serial recording. With digital recording, one person can copy a recording for a friend, who can make a copy of the copy for another friend, who can make a copy of the second copy for yet another friend, and so on. Unlike copies made from analog tapes, each digital copy of a digital copy is as good as the original.

Although the AHRA was enacted specifically to restrict serial recording, it embodies a number of compromises between various competing interests about the future of digital technology. One of the important compromises, and the one most relevant to this case, was struck between certain interests in the recording industry and the interests of the computer industry. H.R. Rep. 102-873(I) at 10 (1992) ("Negotiations among record companies, hardware manufacturers, music publishers, songwriters, and performing rights societies then took place, resulting in an agreement in June 1991. That agreement was reflected in two companion bills . . . introduced [in August 1991]").

As explained below, the AHRA deftly navigates the tension between the various competing interests by excluding computers and general purpose computer storage media (such as hard drives) from the statutory definition of "digital musical recording," 17 U.S.C. § 1001(5)(B)(ii). This reflected a clear legislative intent to affect only the audio recording industry:

In crafting this legislation, the committee intends to address the longstanding issue of audio recording, and only audio recording. . . . The committee has been careful to make clear that this legislation is limited to this issue and to avoid affecting other technologies or other interests even by implication.

S. Rep. 102-294 at 131-2 (1992). Representative Collins, a principal sponsor of the Act, explained as the legislation was being passed in the House that "the legislation does not cover products primarily marketed by the computer industry" 138 Cong. Rec. H9029-01 at H9036 (Sept. 22, 1992).

The computer exception to the AHRA represents a hard-fought and thoughtfully drafted compromise between the computer industry and the recording industry. Moreover, as explained below, the computer exception to the AHRA is expressed in section 1001(5), the definition of "digital musical recordings." "Digital musical recordings" is the foundation on which all other definitions are built.

2. The Rio Player Is Not a "Digital Audio Recording Device" Within the Meaning of the Act.

By its terms, the AHRA does not apply to the Rio because the Rio cannot be classified as a "digital audio recording device" as defined in § 1001(3) of the Act. The Act defines a "digital audio recording device" as a machine "which is designed or marketed for the primary purpose of, and that is capable of, making a digital audio copied recording for private use." 17 U.S.C. § 1001(3) (emphasis added). In turn, the Act defines a "digital audio copied recording" as "a reproduction in a digital format of a digital musical recording, whether that reproduction is made directly from another digital musical recording or indirectly from a transmission." 17 U.S.C. § 1001(1) (emphasis added).

Thus, a device cannot be considered a digital audio recording device within the meaning of the Act unless it is capable of either: (1) the reproduction of digital musical recordings from other digital musical recordings, or (2) the reproduction of digital musical recordings from the transmission of other digital musical recordings. The former method of reproduction is said to be "direct," while the latter method of reproduction is said to be "indirect." In either case, the focus of the Act is on the reproduction of "digital musical recordings."

a. The Rio Player Is Not Capable of Reproducing a "Digital Musical Recording" Within the Meaning of the Statute.

The Act defines "digital musical recording" as "a material object (i) in which are fixed, in a digital recording format, only sounds, and material statements, or instructions incidental to those fixed sounds, if any, and (ii) from which the sounds and material can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." 17 U.S.C. § 1001(5)(A). A digital musical recording does not exist until the musical sounds are "fixed" in some material object, such as a compact disc (CD) or digital audio tape (DAT). Thus, the Act identifies a type of recording in part by the particular medium that carries the recording. A digital copy made from a DAT or CD, or from transmission of a DAT or CD, would be a "digital audio copied recording" within the meaning of the Act.

Section 1001(5)(B)(ii) provides, however, that a "'digital musical recording' does not include a material object in which one or more computer programs are fixed." 17 U.S.C. § 1001(5)(B)(ii). A computer hard drive containing both music files and other computer programs qualifies for the exception contained in § 1001(5)(b)(ii). The express language of the statute thus makes it clear that musical sounds "fixed" on the hard drive of a computer are not "digital musical recordings" within the meaning of the Act. When a computer user downloads an MP3 file from his hard drive to a peripheral playback device such as the Rio Player, he does not reproduce a "digital musical recording" within the meaning of the Act because the hard drive does not qualify as the "digital musical recording."

b. The Rio Player Is Incapable of Recording a Transmission of a Digital Musical Recording Within the Meaning of the Act.

Under the AHRA, a digital audio copied recording is made either from a digital musical recording, as when a copy is made from a CD or DAT, or from the transmission of a digital musical recording, as when a digital audio tape deck records the transmission of a CD or DAT through a digital radio signal. 17 U.S.C. § 1001(1). In one case the source being copied is local and in the other case it is transmitted remotely, but in both cases the element that triggers application of the AHRA is the nature of the source: "a digital musical recording." If the source being recorded is not a "digital musical recording" as defined by the AHRA, the Act does not apply. Id.

Even if the downloading of a file from a remote hard drive (or, more likely, the hard drive of a computer server) via the Internet were a transmission, the object of the transmission is not a "digital musical recording" within the meaning of the Act. An MP3 file fixed on a hard drive containing other computer programs is simply not covered by the Act's definition of "digital musical recording." 17 U.S.C. § 1001(5)(B)(ii).

Nor is it relevant how the MP3 file comes to reside on the remote hard drive from which the Internet user downloads it. Regardless of where the music sounds came from, they cannot be considered "digital musical recordings" under the AHRA once they become fixed on a hard drive containing other computer programs. Id. Put simply, a computer hard drive cannot serve as the material object constituting a "digital musical recording" as defined by the Act. Computer servers, from which virtually all Internet MP3 downloads originate, are not "primarily marketed or most commonly used by consumers for the purpose of making digital audio copied recordings by use of a digital audio recording device."

Even if the downloading of MP3 files from a remote server to a local hard drive somehow fell under the AHRA's definition of a transmission of a "digital musical recording," the Rio Player is not involved in receiving any transmissions. The Rio does nothing more than store the MP3 files that the local hard drive has already downloaded. Spencer Decl. at ¶ 6.

Moreover, the downloading of an MP3 file from a user's local hard drive into the Rio is not a transmission for the purposes of the Act. Although the AHRA does not contain a definition of "transmission," the terms "transmission" and "digital transmission" are defined in § 101 of the Copyright Act. 17 U.S.C. § 101. Under the Copyright Act, "A 'digital transmission' is a transmission in whole or in part in a digital or other non-analog format." 17 U.S.C. § 101. Moreover, "To 'transmit' a performance or display is to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent." Id.

Under the definition of "transmit" supplied by the Copyright Act, the downloading of an MP3 file from a computer hard drive to a peripheral device which, like the Rio Player, is connected to that same hard drive is not a transmission within the meaning of the copyright laws. A transmission occurs only if the recording is communicated beyond the place where it is sent. The Rio Player is just like a printer, a set of speakers, or any other peripheral device that is connected, locally, to the computer. Wirt Decl. at ¶ 5.

Although some peripheral devices -- e.g., network printers, remote display terminals, etc. -- can be configured to operate in a different location than that of the computer to which they are

connected, the Rio Player is not designed or marketed to be such a remote peripheral. *Id.* at ¶ 11. The Rio Player is designed and marketed to be connected to the computer by a short cable. Wirt Decl. ¶ 11. Thus the Rio Player is designed and marketed to be used in the same room as the computer, like a local printer, monitor, or set of speakers. Communicating a file within the same room is not transmission within the meaning of the copyright laws.

**c. Because the Rio is Incapable of Reproducing
"Digital Musical Recordings," It Cannot Be Designed
or Marketed for That Purpose.**

Because the Rio is not capable of making "digital audio copied recording" within the meaning of the Act, it flows naturally that the Rio was not designed or marketed for the primary purpose of making such recordings.

Diamond Multimedia's advertising reinforces that point. Its advertising stresses only the Rio's usefulness in mixing custom selections of tracks from one's personal CD collection or playing music downloaded to the user's personal computer from the Internet. Wirt Decl. at ¶¶ 8, 12.

In sum, Diamond Multimedia's Rio is covered by neither the letter nor the spirit of the Audio Home Recording Act. Plaintiffs have no claim against Diamond Multimedia under the Audio Home Recording Act. If they wish to restrict distribution of computer peripherals that provide high quality sound from computer music files, their remedy lies with Congress, not with the courts.

**3. Even if the AHRA Were to Apply to the Rio, Diamond
Would be Entitled to a Fair Use Defense.**

It is noteworthy that plaintiffs have confined their claim to the AHRA and do not allege any liability of Diamond for copyright infringement. Plaintiffs have wisely omitted a claim for copyright infringement because Diamond would have a fair use defense recognized in the landmark Supreme Court case of Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 439-40 (1983).

A defense of fair use would be especially potent here because, under the AHRA, a consumer may make as many copies of a legally obtained original work as she desires without infringing the owner's copyrights. This is true for both digital and analog copying. Analog recording devices are specifically excluded from the AHRA, yet they are included in this immunity grant. 17 U.S.C. §1008. The intention of the legislature was, that regardless of whether the technology used fell within the governance of the rest of the Act, home recording by consumers, for non-commercial use, would never constitute infringement. 137 Cong. Rec. H6263-01, Aug. 1, 1991(statement of Rep. Brooks: "With regard to consumers, the bill specifically provides that private, noncommercial home audio recording by consumers is immune from copyright infringement actions"); 40 J. Copyright Soc'y U.S.A. 1, 38 (Fall 1992)(statement of Rep. Hughes: "[The Act] gives consumers a complete exemption for noncommercial home copying of both digital and analog music . . ."); H.R.Rep. 102-873(I) at 18 (1992) ("In the case of home taping, the exemption protects all noncommercial copying by consumers of digital and analog

musical recordings"). Use of any device for the home recording of legally obtained original works is not an infringement. Therefore, the plaintiffs cannot claim that Diamond is a contributory or vicarious infringer based on the consumers' use of the equipment to copy original works which have been obtained by the consumer with the authorization of the copyright owner.

Diamond is also entitled to a fair-use defense that is specific to the Audio Home Recording Act. If the AHRA were to apply to the Rio, the fair use defense under the AHRA would arise because (1) the Rio is incapable of serial copying, (2) the Rio is not a long-term storage solution for recorded music, but a transitory storage and playback product, (3) it lacks any digital audio output, and (4) it has substantial noninfringing uses. Cf. Sony, 464 U.S. at 436-440.

C. Plaintiffs Cannot Show Immediate and Irreparable Harm to Justify the Extraordinary Remedy of a Temporary Restraining Order.

One copyright commentator has noted that a plaintiff in a copyright case must show a higher standard of irreparable harm on an application for temporary restraining order than on a motion for preliminary injunction:

The extraordinary nature of the remedy and the relative brevity of plaintiff's injury before a preliminary injunction can be entered suggest that the irreparable harm standard for temporary restraining orders should be more rigorous than the irreparable harm standard for preliminary injunctions.

P. Goldstein, Copyright § 11.1.1 (2d ed. 1995).

Plaintiffs seek to inflame passions in this case by dwelling at length upon "piracy" of musical recordings on the Internet. "Piracy" of musical recordings is not new. Mudd Decl. at ¶¶ 11-12; Bridges Decl. at ¶ 3 and Exh. B. More importantly, "piracy" of musical recordings will not increase as a result of Diamond's Rio. Kohn Decl. at ¶ 10. As established above, the Rio cannot be used for serial recording, has no digital audio output, and cannot upload files to the Internet.

The kernel of the Plaintiffs' complaint is simply that the playback of digital music files from a computer will be so attractive as a result of the Rio that it must be prevented. Although the Plaintiffs have alleged that the attractiveness of Rio's playback will encourage unlawful copying of music, the Plaintiffs have failed to furnish any proof, or even a reasoned exposition, of that fact.

Plaintiffs merely rely upon bold conjecture and wave the flag of "piracy." That is not a showing of irreparable harm at all, much less the strong showing required to obtain the drastic remedy of a temporary restraining order.

Nor may Plaintiffs rest upon a presumption of irreparable harm. Such a presumption flows only from a demonstration of probable success on the merits. Where, as here, Plaintiffs have "failed to demonstrate a probability of success on the merits, no presumption of irreparable injury arises." Chase-Riboud, 987 F.Supp. at 1232 (Collins, J.) (citing Cadence Design Sys., Inc. v. Avant! Corp., 125 F.3d 824, 826 (9th Cir. 1997)). Moreover, even if the Plaintiffs were to have

established the presumption, the presumption is not conclusive. The evidence about the marketplace furnished by Diamond Multimedia has fully rebutted any presumption upon which Plaintiffs rely.

This Court should therefore deny the motion on the ground that Plaintiffs lack any credible showing of irreparable harm.

D. The Balance of Harms Tips Overwhelmingly Against Any Injunction or Restraint.

The Plaintiffs have failed to show any direct harm to them or to the interests of their members as a result of the marketing of Diamond's Rio Player. Indeed, because some mainstream groups represented by the Plaintiffs legitimately distribute their music in MP3 format, evidence suggests that some of the Plaintiffs' members may actually benefit from Diamond's marketing of an attractive consumer MP3 player. For example, the popular group Beastie Boys distributes its music at its own web site in MP3 format. See <http://www.beastieboys.com/crtlrn/> (World Wide Web, Oct. 12, 1998, at 12:11 a.m.); Bridges Decl. at ¶ 5 and Exh. D. It is therefore not clear that the balance of harms within the Plaintiffs' own memberships supports an injunction.

On the other hand, the record is clear that any restraint or injunction against the launch of the Rio will have serious effects upon Diamond Multimedia by thwarting the launch of a product that it is the first to market. Significant momentum would vanish, and the opportunity to promote the product heavily at the critical fall COMDEX trade show, in the autumn, would be lost. Wirt Decl. at ¶ 13. The fall COMDEX show is the most important computer industry marketing event of the year. Id.

Moreover, as more fully discussed below in connection with the bond, delay in the launch of the product as a consequence of a restraint or injunction would not merely postpone Diamond's revenue. It may kill the product altogether. The pace of innovation and product introduction in the computer industry is lightning fast -- sometimes referred to as "Internet speed" -- and those who linger at the starting line may not even get to join the race. Failure of Diamond to enter the market at this time, based on what is couched as a temporary restraint or preliminary injunction, would have a conclusive and fatal effect. Watkins Decl. at ¶ 4.

E. The Public Interest Resoundingly Opposes an Injunction. Instead, it Calls for Development of the Internet as a Medium for Legitimate Distribution of Music and for Improved Performance of Computer Music Media.

The RIAA argues repeatedly that the public policy against music "piracy" over the Internet favors an injunction in this case. Yet, as noted above, the RIAA cannot explain how the Rio will contribute to an increase in music "piracy." The Rio has no digital upload or any digital audio output feature. Once stored in the Rio's flash memory, the only output for the music is through a set of analog headphones. There is, therefore, no danger of serial digital copying.

In essence, the RIAA's argument boils down to nothing more than the complaint that increased availability of MP3 technology will be a bad thing for the dominant music labels in the recording industry. The proliferation of MP3 technology and the increased availability of devices to play MP3 files may endanger the big-six record labels' control over the distribution of music to the consuming public, but this would promote, not harm, the public interest at large.

The success of music distribution over the Internet will benefit small record labels that, although denied access to shelf-space in retail outlets, now have an alternate method of reaching the consuming public. Kohn Decl. at ¶ 17; Mudd Decl. at ¶ 7; Schatzkin Decl. at ¶¶ 3, 17. Small labels will face lower startup costs, minimal overhead, and significantly lower operating costs in general. Schatzkin Decl. at ¶ 11. Small labels will have the opportunity to reach a much larger customer base. The Internet has revolutionized the process of niche marketing, by which small companies can sell to a geographically disparate base of customers who all share an interest in a small submarket of products that might not otherwise be profitable to offer.

The success of music distribution over the Internet will benefit small artists who cannot get the attention of the big record labels. Catherine Decl. ¶¶ 3, 5. Small artists whose music was once heard only by the small number of fans fortunate enough to see them, can now gain exposure to a potentially massive fan base. Id.; Schatzkin Decl. at ¶ 3.

The success of music distribution over the Internet will also benefit the manufacturers of computers and computer peripherals. As the Internet becomes an increasingly important aspect of the daily lives of individuals everywhere, users will place more and heavier demands on the equipment designed to bring the Internet into their homes. The future of the entire computer industry depends upon the ability of manufacturers to meet the needs of consumers by offering better quality music media products at lower prices. Schatzkin Decl. at ¶¶ 13, 14.

Finally, and most importantly, the success of music distribution over the Internet will benefit consumers of music and music-related products. Mudd Decl. at ¶ 8. Increased availability of digital music over the Internet has already lead to an incredible expansion of the choices available to consumers. As small labels, small artists, and members of the computer industry all begin exploiting the power of the Internet, consumers will also benefit from the lower prices and technological innovation stimulated by a more competitive market for the distribution of music.

I. (Bond argument redacted)

CONCLUSION

For the reasons stated above, the Court should deny the Plaintiffs' request for a temporary restraining order and order to show cause.

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Respectfully submitted,

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